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August 5, 2008

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: February 27, 2008

Case Number: TSO-0607

This decision concerns the eligibility of XXXX XXXXXXXX (hereinafter referred to as "the Individual") to maintain an access authorization under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material."¹ This decision considers whether, on the basis of the evidence in this proceeding, the Individual's access authorization should be restored. For the reasons stated below, I find that the Individual's access authorization should not be restored.

I. BACKGROUND

A background re-investigation of the Individual revealed significant derogatory information which cast a substantial doubt upon the Individual's ability to maintain a DOE security clearance. On two occasions, on December 20, 1999, and March 19, 2002, the Individual was arrested for shoplifting. On September 19, 2004, the Individual was arrested for Driving Under the Influence of alcohol (DUI). Moreover, the Individual failed to report these three arrests to the local DOE security office (LSO) in a timely manner. The Individual also omitted his treatment by a psychiatrist from a Questionnaire for National Security Positions (QNSP). Because this information raised significant security concerns about the Individual, the Local Security Office (LSO) conducted two Personnel Security Interviews (PSI) of the Individual, one on May 5, 2005, and the other on December 20, 2005.² The LSO also requested that a background investigation of the Individual be conducted by the Office of Personnel Management (OPM). The OPM Investigation and PSIs failed to resolve the security concerns raised by the derogatory information concerning the Individual. Information obtained during the OPM Investigation and PSIs actually raised additional security concerns.

¹ An access authorization is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5. Such authorization will be referred to in this Decision as an access authorization or a security clearance.

² The May 5, 2005, PSI transcript appears in the record as DOE Exhibit (Exhibit) 4. The December 20, 2005, PSI transcript appears in the record as Exhibit 3.

May 5, 2005 PSI

During the May 5, 2005, PSI, the Individual discussed his September 19, 2004, DUI arrest. The Individual claimed that the arresting officers interpreted his request to make a phone call as a refusal to take a breathalyzer test. Exhibit 4 at 4-6. The Individual explained that he delayed reporting the DUI to the LSO for three months because he was waiting to see if the fine would exceed \$100 or not. *Id.* at 12-17. The Individual further explained that he had not reported his two shoplifting arrests in a timely matter because the citations were for less than \$100 and because the charges from both had been dismissed. *Id.* at 29-30.

The Individual also discussed his December 20, 1999, arrest for shoplifting. The Individual claimed that he had carried both his checkbook and a book around the store and had placed his checkbook underneath his coat. *Id.* at 32. According to the Individual, a store employee mistakenly thought she had observed him placing a book underneath his coat and asked him to come to the store office before he started to leave the store. The police were called and they issued a citation to the Individual for Petty Theft. *Id.* at 33.

The Individual also discussed his March 19, 2002, arrest for shoplifting. The Individual indicated that he had stopped at a supermarket on his way to work. The Individual asserted that he had forgotten his wallet and was late for work. The Individual attempted to shoplift food for lunch at work. *Id.* at 37. When asked by the interviewer how often he shoplifted, the Individual stated “Not often.” *Id.* The Individual then denied that he had ever shoplifted before. *Id.* The Individual stated that the store manager told the police that he suspected that the Individual had shoplifted from the supermarket on a number of previous occasions. *Id.* at 38. The store manager also claimed that the Individual had admitted a history of shoplifting. The Individual denied that he had admitted a history of previous shoplifting to the store manager. *Id.* at 40-41. The Individual subsequently spontaneously opined that he was “not a habitual shoplifter.” *Id.* at 47. When asked to clarify what he meant by “habitual shoplifter” the Individual responded by stating: “I-I had the two instances . . . I didn’t go out and do it everyday.” *Id.* at 48.

QNSP

On June 30, 2005, the Individual completed and submitted a QNSP to the LSO. Question 21 of this QNSP asked the Individual if, “In the last 7 years, have you consulted with a mental health professional (psychiatrist, psychologist, counselor, etc.) or have you consulted another health care provider about a mental health related condition?” The Individual answered this question “No.” Exhibit 10 at 7. However, the Individual had been treated with medication for “compulsive traits” by a psychiatrist (the Treating Psychiatrist) in 2002. Exhibit 7 at 3; Exhibit 8 at 1. The Treating Psychiatrist indicated that the Individual had presented with “significant impulsivity with shoplifting, mood fluctuations, and significant irritability to the point of causing distress with children and wife.” Exhibit 7 at 3.³

³ The Individual was also examined by a DOE Psychiatrist, who found that the Individual did not suffer from an illness or mental condition that affected his judgment or reliability. Exhibit 7.

The QNSP also required that the Individual disclose any arrests or criminal charges filed against him. The Individual reported each of the arrests as required. The Individual prepared an addendum to his QNSP in which he provided a short description of the circumstances leading to each arrest. The Individual provided the following accounts of his three arrests:

I was arrested on DUI charge on 9/19/2004. I was asked to take a breath test, officer thought I refused so he charged me with DUI. My license was suspended temporarily. The charge was later reduced to inattentive driving. . . .

Petit theft charge – December 1999 at the . . . Target store. Was carrying a book under my coat and tried to leave the store.

Petit theft charge – April 2002 at . . . supermarket . . . for trying to leave the store with food items in my pockets.

Exhibit 10 at 13.

July 13, 2005, Security Supplement Form

On July 13, 2005, the Individual signed and submitted a Security Supplement Form (SSF) to the LSO. Exhibit 11. The SSF indicated that the Individual had been charged with petit theft on two occasions: in December 1999, when he “was carrying a book underneath his coat and tried to leave the store,” and again in April 2002 for “trying to leave a store with food items in my pockets.” *Id.* at 3.

October 24, 2005, Interview

On October 25, 2005, the Individual was interviewed by an investigator from the Office of Personnel Management (OPM).⁴ During this interview, the Individual admitted that he had shoplifted on March 19, 2002. Exhibit 10 at 15-16. The Investigator’s report makes the following statement about the December 20, 1999 shoplifting arrest:

In 12/99 he was arrested for petit theft shoplifting [The Individual] again did not have his wallet on his person after just going to the store from a work out at a gym. He had a book under his arm when he attempted to leave the store without paying, and was then confronted by an employee. He did not actually leave the store with the book.

Id. at 16. The OPM Investigator’s report also indicates that the Individual’s two former spouses suspected the Individual of shoplifting. DOE Exhibit 10 at 32-33, 36-37. The Individual also claimed that he had not consulted any mental health professional or other care provider about a mental health related condition. *Id.* at 17.

⁴ The OPM investigator’s record of this October 24, 2005, interview appears in the record as part of Exhibit 10.

December 20, 2005 PSI

During the December 20, 2005, PSI, the Individual again discussed his December 20, 1999, arrest for shoplifting. On this occasion, the Individual claimed he had placed a book under his arm and proceeded towards the cash register. The Individual then claimed he realized “I didn’t have my wallet or checkbook with me.” Exhibit 3 at 4. According to the Individual, he then put the book down, and started to leave the store when he was asked by a store security representative to accompany her to the store office where she accused him of attempting to shoplift the book. *Id.* at 4-5. Later in the interview, the Individual claimed he put the book down and then joined the line at the cash register where the store security representative subsequently asked him to accompany her to the store office. *Id.* at 5. The Individual claimed he did not intend to leave the store with the book. *Id.* The Individual denied he left the store with a book. *Id.* at 8-9. Next, the Personnel Security Specialist (PSS) asked the Individual why he stated on his QNSP that he was “carrying a book under my coat and tried to leave the store.” The Individual responded by stating: “I was told to write what I was accused of doing [by] my people out there in security personnel.” *Id.* at 11.

When asked why he had not reported his treatment by the Treating Psychiatrist on his QNSP, the Individual contended that he had in fact reported this treatment. *Id.* at 17. The Individual asserted that he had provided the correct information to his employer’s security office that was preparing the form for him. According to the Individual, this office mistakenly shredded his information and forwarded an obsolete copy of his security information to the LSO without providing the Individual with an opportunity to review the form for accuracy. *Id.* at 17-19. When the Individual was confronted with his signed certification attesting to the accuracy of his QNSP, he provided a number of completely irrelevant responses before he asserted that he was not seeing the Treating Psychiatrist for a “mental condition.” *Id.* at 19-21. The Individual claimed that he was seeing the Treating Psychiatrist solely for marital counseling. *Id.* at 22-27. The Individual stated that the Treating Psychiatrist prescribed Depakote to treat the Individual’s leg spasms. *Id.* at 27-28. The Individual denied having any anger or temper problems. *Id.* at 34. The Individual denied discussing mood swings with the Treating Psychiatrist. *Id.* at 49.

Neither the PSIs, nor the OPM investigation, resolved the significant doubts about the Individual’s trustworthiness, judgment and reliability raised by the Individual’s three arrests, failure to report these arrests in a timely manner and omission of his psychiatric treatment on the QNSP. In fact, the conflicting and difficult-to-believe explanations provided by the Individual during the PSIs raised further doubts about the Individual.

Accordingly, the LSO initiated an administrative review proceeding. *See* 10 C.F.R. § 710.9. The LSO then issued a letter notifying the Individual that it possessed information that raised a substantial doubt concerning his eligibility for access authorization (the Notification Letter) under 10 C.F.R. § 710.8(l) (Criterion L).⁵

⁵ Criterion L states: Engaged in any unusual conduct or is subject to any circumstances which tend to show that the individual is not honest, reliable, or trustworthy; or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation, or duress which may cause the individual to act contrary to the best interests of the national security. Such conduct or circumstances include, but are not limited to, criminal behavior, a

Specifically, the Notification Letter alleges that:

- 1) The Individual has been arrested for shoplifting on two occasions.
- 2) The Individual has been arrested for Driving under the Influence of Alcohol.
- 3) The Individual did not report any of his three arrests to the LSO in a timely manner.
- 4) The Individual has provided conflicting statements and explanations of the circumstances surrounding those arrests during the present proceeding.
- 5) The Individual has been less than honest about the full extent of his shoplifting.
- 6) The Individual denied that he had ever had problems with anger, mood swings, or temper issues, when evidence in the record indicates that he was treated by a Psychiatrist for those conditions.
- 7) The Individual failed to disclose that he had received treatment for anger, mood swings, or temper issues in his QNSP.

Statement of Charges at 1-3.

The Individual filed a response to the allegations in the Notification Letter and a request for a hearing. In his response, the Individual admits that he shoplifted when he was arrested in 2002, but attributes his lack of judgment at that time to a fight he had with his then wife. He also denies in his response that he was shoplifting when he was arrested in 1999. He further contends in his response that he was not intoxicated when he was arrested for DUI and that he did not refuse to take a blood alcohol test as alleged in the police report. Finally, he tries to impeach the credibility of one of his former spouses in his response. The LSO forwarded the response and hearing request to the Director of the Office of Hearings and Appeals (OHA) who appointed me as Hearing Officer.

The Hearing

At the hearing, the LSO presented two witnesses: a DOE Personnel Security Specialist and a DOE Polygraph Examiner. The Individual presented no witnesses. He did, however, testify on his own behalf. *See* Transcript of Hearing, Case No. TSO-0607 (hereinafter cited as "Tr."). The LSO submitted 18 exhibits.⁶ The Individual submitted five exhibits.

pattern of financial irresponsibility, conflicting allegiances, or violation of any commitment or promise upon which DOE previously relied to favorably resolve an issue of access authorization eligibility.

⁶ At my request, the LSO supplemented its exhibits, after the hearing, with the submission of the Treating Psychiatrist's records of his treatment of the Individual. These records appear in the record as Exhibit 18.

At the hearing, the Individual denied that he had admitted shoplifting in the December 20, 1999, incident on his QNSP. The Individual testified that he had been “told to put down what [he] was accused of doing, not what actually happened” Tr. at 51. The Individual testified that he failed to report this arrest within five days, as required by the LSO, because he thought he was not required to report arrests that were subsequently dismissed. *Id.* at 52, 54. The Individual testified that he had placed a book under his arm and then placed his checkbook under his waistband. *Id.* at 53. The Individual testified that when he realized he didn’t have his wallet with him, he put the book down and began walking towards the store’s exit. *Id.* at 53. Before he could exit the store, the Individual testified, he was asked to go to the store manager’s office. *Id.* at 53.

The Individual testified that he had in fact shoplifted in March 2002, but was not thinking clearly at the time because he had been hit by his then spouse. *Id.* at 54-55. The Individual testified that this was the only occasion in which he had shoplifted. *Id.* at 57-58.

The Individual testified about his DUI arrest. The Individual denied that he had refused to take a blood alcohol level test (BAL Test). *Id.* at 61-62. He contended that he was not allowed to take a BAL Test by the arresting officers, who construed his request to make a phone call as a refusal to take the BAL Test. *Id.* at 61, 63, 73. The Individual claimed that if he had been allowed to take the BAL Test, it would have proven that he was not intoxicated. *Id.* at 63. When pressed by the Hearing Officer, the Individual admitted that he did not insist on taking the BAL Test. *Id.* at 73-74. When he was asked why he failed to report his arrest for DUI in a timely manner, the Individual responded by stating: “I was waiting to fill out the paperwork for my clearance.” *Id.* at 64.

The Individual testified that he “initially” sought treatment from the Treating Psychiatrist for “marital counseling.” *Id.* at 65. The Individual denied that he discussed a compulsion to shoplift with the Treating Psychiatrist. *Id.* at 68. The Individual admitted that he did not report his treatment by the Treating Psychiatrist on his QNSP. *Id.* at 68. The Individual admitted that he should have reported the arrests on a timely basis. *Id.* at 84.

II. STANDARD OF REVIEW

The Hearing Officer's role in this proceeding is to evaluate the evidence presented by the agency and the Individual, and to render a decision based on that evidence. *See* 10 C.F.R. § 710.27(a). The regulations state that “[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all the relevant information, favorable and unfavorable, as to whether the granting or continuation of access authorization will not endanger the common defense and security and is clearly consistent with the national interest.” 10 C.F.R. § 710.7(a). I have considered the following factors in rendering this opinion: the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, including knowledgeable participation; the frequency and recency of the conduct; the Individual's age and maturity at the time of the conduct; the voluntariness of the Individual's participation; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the

motivation for the conduct; the potential for pressure, coercion, exploitation, or duress; the likelihood of continuation or recurrence; and other relevant and material factors. *See* 10 C.F.R. §§ 710.7(c), 710.27(a). The discussion below reflects my application of these factors to the evidence presented by both sides in this case.

III. ANALYSIS

The Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information issued by the Assistant to the President for National Security Affairs issued by the The White House on December 29, 2005 (the Adjudicative Guidelines) state, in pertinent part:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information issued by the Assistant to the President for National Security Affairs, The White House (December 29, 2005) (Adjudicative Guidelines) at Guideline E. The Adjudicative Guidelines specifically state that “deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities” could raise security concerns about an individual. Adjudicative Guideline E. The Adjudicative Guidelines further state that “deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative” could raise security concerns about an individual. *Id.* The Adjudicative Guidelines also note that “personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress can also raise security concerns about an individual.” *Id.*

In the present case, the Individual has been arrested on at least three occasions during the past nine years. On one occasion, the Individual was arrested for DUI, and on the other two occasions the Individual was arrested for shoplifting. Although he was required to report each of these arrests to the LSO within five days, he failed to do so. Moreover, the Individual omitted his psychiatric treatment from his QNSP. During his background investigation, the Individual provided conflicting and difficult-to-believe accounts of the incidents which led to his arrests. The explanations provided by the Individual for his delay in reporting his arrests and his omission of his psychiatric treatment from the QNSP lacked credibility. Moreover, the Individual's accounts of the incident which led to the 1999 shoplifting arrest lacked both consistency and credibility. For these reasons, I find that the LSO properly invoked Criterion L.

A finding of derogatory information does not, however, end the evaluation of evidence concerning an individual's eligibility for access authorization. See *Personnel Security Hearing (Case No. VSO-0244)*, 27 DOE ¶ 82,797 (affirmed by OSA, 1999); *Personnel Security Hearing (Case No. VSO-0154)*, 26 DOE ¶ 82,794 (1997), *aff'd*, *Personnel Security Review (Case No. VSA-0154)*, 27 DOE ¶ 83,008 (affirmed by OSA, 1998). In the end, like all Hearing Officers, I must exercise my common sense judgment in deciding whether the Individual's access authorization should be restored after considering the applicable factors prescribed in 10 C.F.R. § 710.7(c). Therefore, I must consider whether the Individual has submitted sufficient evidence of mitigation to resolve the security concerns raised by his three arrests, reporting delays, false statements to investigators and omission of his psychiatric treatment from his QNSP. After considering all of the evidence in the record, I find that he has not.

Throughout the investigation and adjudication of the Individual's eligibility for a security clearance, the Individual's actions and statements have established a pattern of dishonesty. On two occasions, the Individual has been arrested for shoplifting. While the Individual admitted his March 19, 2002, citation for petty theft, he provided a number of conflicting accounts of the incident which lead to his December 20, 1999, arrest. During the May 5, 2005, PSI, the Individual contended that he had carried both his checkbook and a book around the store and had placed his checkbook underneath his coat when a store employee mistakenly thought she had observed the Individual placing a book underneath his coat and asked him to come to the store office before he had started to leave the store. On June 30, 2005, the Individual signed and submitted a QNSP in which he provided the following description of the December 20, 1999, incident: "Was carrying a book under my coat and tried to leave the store." The Individual repeated this account in the SSF he submitted on July 13, 2005. During the December 20, 2005, PSI, the Individual provided two accounts of the incident leading to his December 20, 1999, arrest. Initially, the Individual claimed that when he realized that he did not have his wallet or checkbook with him, he put the book he was carrying down and began to leave the store, when he was asked to go to the manager's office. Later on in the PSI, the Individual claimed he put the book down and then joined the line at the cash register where the store security representative subsequently asked him to accompany her to the store office. (Since the Individual claimed that the book was the only item of merchandise he was carrying in the store, he was essentially claiming that he put the book down and then stood in line at the cash register, even though he did not have either merchandise he wished to buy, or a wallet or checkbook with which to make such a purchase). At the hearing, the Individual testified that he had placed the book under his arm and then placed his checkbook under his waistband. The Individual testified that when he realized he did not have his wallet with him, he put the book down and began walking towards the store's exit.⁷

The conflicting accounts provided by the Individual concerning the December 20, 1999, arrest make it difficult to assign credibility to the Individual's assertion that he had not shoplifted on that date. I therefore find that the Individual more likely than not shoplifted on December 20,

⁷ During an exculpatory polygraph examination conducted on September 26, 2006, at the Individual's request, he denied that he had shoplifted on December 20, 1999. Exhibit 6. The Polygraph Examiner testified that, in his opinion, the Individual provided deceptive answers to questions concerning the shoplifting allegations.

1999. Because, it appears that the Individual shoplifted on December 20, 1999, and continued to claim otherwise during his hearing, I am of the opinion that the Individual's deceptiveness on this matter was continuing at the time of the hearing.

The Individual's accounts of his September 19, 2004, DUI arrest also cast doubt upon his credibility. Throughout his investigation and adjudication, the Individual has denied that he refused to take a breathalyzer test. The Individual claimed that the arresting officers interpreted his request to make a phone call as a refusal to take a breathalyzer test. At the hearing, the Individual admitted that he did not insist on taking a breathalyzer test.

The Individual's failure to report his treatment by a Psychiatrist on the QNSP calls into question his honesty. In addition, the Individual's explanations for his failure to report his visits to the Treating Psychiatrist on the QNSP are not believable.⁸ First, the Individual claimed that he had provided the correct information to the person who typed the form for him. He did not provide no corroboration on this point, however. Second, the Individual asserted that the Treating Psychiatrist was not treating him for a mental condition, but was instead providing "marriage counseling." While the Treating Psychiatrist's records indicate that the Individual first sought treatment because his marriage was ending, those records also show that the Individual was being treated by the Treating Psychiatrist for impulsivity, obsessive traits, mood fluctuations and compulsive behaviors and had been prescribed medication to stabilize his mood and curtail his impulsivity. Exhibit 18 at 10. Hence, the documentary evidence confirms that the Individual was not totally candid with the DOE.

In the end, the evidence in the record paints a troubling picture of the Individual. The evidence shows a pattern of three arrests, repeated failures to provide the LSO with required information on a timely basis and most importantly, a significant and noteworthy pattern of dishonesty and prevarication which continued through the hearing. The Individual has not brought forth any evidence to mitigate the Criterion L concerns as issue.

IV. CONCLUSION

For the reasons set forth above, I conclude that the Individual has not resolved the security concerns raised under Criterion L. Therefore, the Individual has not demonstrated that restoring his security clearance would not endanger the common defense and would be clearly consistent with the national interest. Accordingly, I find that the Individual's access authorization should not be restored at this time. The Individual may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

Steven L. Fine
Hearing Officer
Office of Hearings and Appeals

Date: August 5, 2008

⁸ The Individual also told the OPM investigator that he had never consulted any mental health care professional or other healthcare provider about a mental health-related condition.